

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

**CASE NO. 04-22572-Civ-King**

EMMA YAIZA DIAZ *et al.*,

Plaintiffs,

v.

KURT S. BROWNING, Secretary of State of  
Florida

Defendant.

**PLAINTIFFS' OPPOSITION WITH INCORPORATED MEMORANDUM OF LAW TO  
DEFENDANT BROWNING'S MOTION FOR SUMMARY JUDGMENT OR, IN THE  
ALTERNATIVE, PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff unions, the AFL-CIO, AFSCME, Council 79, and SEIU ("Plaintiffs"), pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7.5, hereby cross-move for summary judgment in their favor and the alternative oppose Defendant Browning's ("Defendant") Motion for Summary Judgment and respectfully request that summary judgment not be awarded in favor of Defendant.

1. Plaintiffs agree with Defendant that the standard for summary judgment is well-established and believe it is unnecessary to restate the standard.
2. Plaintiffs agree with Defendant that there are no genuine issues of material fact to be tried. However, Plaintiffs dispute many of the supposedly undisputed facts put forth by Defendant: those issues, however, are not material to this case. As set forth in Plaintiffs' counterstatement to undisputed facts, the evidence demonstrates that Plaintiffs are entitled to summary judgment in their favor.
3. Plaintiffs cross-move for summary judgment. If the Court finds this cross-motion to be untimely, Plaintiffs believe that this Court nevertheless should grant summary

judgment on their behalf, on the Court's own motion. On a Rule 56 motion, a Court may find in favor of the non-movant. *Artistic Entm't, Inc. v. City of Warner Robins*, 331 F.3d 1196, 1202 (11th Cir. 2003) (“[W]here a legal issue has been fully developed, and the evidentiary record is complete, summary judgment is entirely appropriate.”); *Massey v. Cong. Life Ins. Co.*, 116 F.3d 1414, 1417 (11th Cir. 2007) (“District courts unquestionably have the power to trigger summary judgment on their own initiative.”). Such a finding is appropriate when it appears clearly upon the record that all of the evidentiary matters that a party might submit in response to a motion for summary judgment are before the court. *Artistic Entm't*, 331 F.3d at 1201-02; *Fortson v. Colangelo*, 434 F. Supp. 2d 1369, 1373 (S.D. Fla. 2006).

4. In the alternative, Plaintiffs oppose Defendant's motion and ask that the Court deny summary judgment in Defendant's favor. The Court should “view all evidence and make all reasonable inferences in favor of the party opposing summary judgment,” i.e. Plaintiffs. *Allen v. Bd. of Pub. Educ. for Bibb County*, 495 F.3d 1306, 1313 (11th Cir. 2007) (citing *Whatley v. CNA Ins. Cos.*, 189 F.3d 1310, 1313 (11th Cir.1999)); *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). “The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Id.* at 1315, quoting *Anderson*, 477 U.S. at 255.

5. In support of this Cross-Motion and Opposition to Defendant's motion, Plaintiffs submit the attached Memorandum of Law, a Statement of Material Facts as to which there is no issue of fact to be tried, the Declaration of Thomas Abt, attached hereto as Exhibit A, and the Declaration of Sarah Nolan, attached hereto as Exhibit B, which attach deposition excerpts, interrogatory responses, as well as documents and data produced in discovery.

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**MEMORANDUM OF LAW**

**Preliminary Statement**

This brief constitutes an opposition in name only. The undisputed facts and applicable law require that summary judgment should be awarded to the Plaintiffs, and not to the Defendant.

In its Order on the Motion to Dismiss, this Court has defined the issue in this case to be whether “Florida’s twenty-nine day deadline, *without a grace period*, is reasonable as a matter of law.” (D.E. No. 201 at 13) (emphasis added). The reasonableness and constitutionality of the twenty-nine day book closing deadline, Fla. Stat. § 97.055 (the “Book Closing Statute”), itself is *not* at issue. Plaintiffs are not asking the Court to move the book closing deadline; but are seeking relief for voters who applied before, and in many cases well before, the close of books. The Book Closing Statute is only at issue insofar as it prevents the County Supervisors from adding a new voter to the rolls, whose timely application was already entered into the Statewide database, but who was unable to respond to an incomplete application notice prior to the close of books. Plaintiffs seek a grace period permitting the County Supervisors to accept corrections after the close of books and add these new registrants to the rolls up until the election as their applications are processed.

The uncontroverted evidence shows that the harms worked by § 97.055 are substantial. The lack of a grace period has denied thousands, even tens of thousands, of Floridians the right to vote. Based on data from the 2006 election cycle produced to Plaintiffs by the Defendant himself, approximately 11,700 individuals filed incomplete applications within thirty days before the close of books and likely did not receive notice in time to correct their applications prior to the close of books. The Supervisors of Elections from Broward, Duval, Miami-Dade, Orange and Palm Beach (the former County defendants), who are the chief election officials in five of the six largest counties in Florida,<sup>1</sup> executed a Joint Declaration filed with this Court on October 3, 2006, stating under penalty of perjury that there were hundreds, even thousands of new registrants in each of the defendant counties each election cycle who submitted incomplete applications during the weeks immediately prior to the book closing, that many voters had been injured, and that they expected the circumstances to be the same during the 2008 election cycle.

The undisputed evidence also establishes that the failure to provide a grace period is not reasonable and therefore must be struck down by this Court as failing the applicable test under

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<sup>1</sup> Hillsborough County, Florida’s fourth largest county in terms of voter registration, is not a party to this action. Prior to the 2005 amendment of § 97.055, however, Hillsborough County accepted corrections to voter registration applications after the book-closing date without incident. (*See* Johnson Dep. 21.)

*Anderson v. Celebrezze*. 460 U.S. 780 (1983) In their Declaration, the former defendant Supervisors state candidly, “Other than Florida Statutes and opinions issued by the Secretary of State, none of the Supervisors know of any policy precluding the provision of a grace period.” (Ex. 1 ¶ 21.) The Supervisors also declare that providing a grace period (a) would not interfere with the orderly administration of elections; (b) would not unduly burden the resources of their offices; and (c) would not interfere with other election-related activities. (*Id.* ¶ 22.) Lastly, the Supervisors agree to implement a grace period should the law change to allow for one. (*Id.* ¶ 19.) Defendant does not challenge the Supervisors’ Declaration, which affirmatively establishes that the State’s failure to provide a grace period is not necessary to achieve *any* state goal, much less the boilerplate interests advanced by Defendant. Even absent any other evidence, the Supervisors’ Declaration would provide a sufficient basis for granting summary judgment in this case. The Court, however, need not rely on the Supervisors’ Declaration alone. Each statement made in the Declaration is also supported by extensive undisputed evidence gathered in discovery.

Defendant does not submit evidence in support of his position that a grace period is reasonable, let alone necessary to achieve any governmental interest. His Memorandum of Law *does not contain a single fact* justifying § 97.055’s failure to include a grace period. In his Statement of Undisputed Facts, *a grace period is not even mentioned*. Rather than address the merits of § 97.055’s failure to provide a grace period, Defendant presents a series of straw men, citing inapplicable law and defending an aspect of the statute that has not been challenged – the registration deadline itself. But the Court, in its Order on Motion to Dismiss could not have been clearer in framing the issue for the parties: It is the reasonableness of the *lack of a grace period*, and not the registration deadline itself, which must be justified.

Defendant also challenges Plaintiffs’ standing, falsely claiming that Plaintiffs cannot satisfy the modest requirements for an Article III “case or controversy.” *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-184 (2000). At the same time, the Defendant’s own motion papers include evidence that establishes unequivocally that at least twenty-nine union members were injured. It is black letter law that if one of its members was injured, an association has standing. *Sierra Club v. Johnson*, 463 F.3d 1269, 1279 (11th Cir. 2006). Moreover, if only one Plaintiff has standing, that is sufficient to establish a case or controversy. *ACLU v. Miami-Dade County School Bd.*, 439 F.Supp.2d 1242 (S.D. Fla. 2006), citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 n. 9 (1977).

Plaintiffs’ evidence as to harm caused by § 97.055, the Supervisors’ Joint Declaration, and the other undisputed evidence gathered in discovery, taken together,

overwhelmingly establish that there is no genuine issue of material fact in this action. Defendant has utterly failed to demonstrate (indeed, he does not even try) why prohibiting a grace period is reasonable, let alone necessary to achieve a any government interest at all. The only support he proffers are boilerplate arguments, not evidence.

### **Argument**

Plaintiffs seek, and are entitled to, declaratory and injunctive relief as to § 97.055. A party is entitled to an injunction when it can show (1) actual success on the merits; (2) a substantial threat that the party will suffer irreparable injury if the relief is not granted; (3) the threatened injury to the party outweighs the threatened harm injunctive relief may cause to the opposing party; and (4) the issuance of the injunction would not be adverse to the public interest.<sup>2</sup>

#### **I. Plaintiffs Have Standing To Sue On Behalf Of Themselves And Their Members**

Plaintiffs have provided undisputed evidence clearly establishing independent grounds for standing based on: (1) associational standing on behalf of its members and 2) organizational standing on its own behalf.

In his Memorandum, Defendant contests Plaintiffs' associational and organizational standing. In doing so, he repeatedly misconstrues the facts and applicable law. For associational standing, Defendant argues that Plaintiffs have not identified a single injured union member in the past (simply untrue) and cannot identify one in the future (an impossible standard under the circumstances with no basis in law). For organizational standing, he presents a straw man and claims that "mere diversion" of resources should not confer standing, when establishing a concrete and demonstrable injury is exactly what the law in this area requires. Under Defendant's analysis, it appears that no plaintiff can sue the state for anything ever.<sup>3</sup>

#### **A. Plaintiffs Have Associational Standing to Sue on Behalf of their Members**

"An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect

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<sup>2</sup> *Del Pino v. AT&T Info. Sys., Inc.*, 921 F. Supp. 761, 765 (S.D. Fla. 1996); *Panama City Med. Diag. v. Williams*, 13 F.3d 1541, 1545 (11th Cir. 1994); *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 546 n. 12 (1991).

<sup>3</sup> This is not the first challenge to Plaintiffs' standing in this action. On October 26, 2004, the Court dismissed this action, holding that Plaintiffs' lacked both associational and individual standing. (D.E. No. 82.) On September 28, 2005, the Eleventh Circuit reversed this ruling, finding that Plaintiffs had sufficiently alleged standing and remanded the case for further proceedings. No. 04-15539, 2005 WL 2402748 (11th Cir. Sept. 28, 2005). Without question, mere allegations will not suffice at this stage of the action, but Plaintiffs have provided undisputed evidence proving the claims alleged in complaint as to standing, thus the Eleventh Circuit's ruling on this issue remains instructive.

are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."<sup>4</sup> Plaintiffs clearly meet each element of this standard.

**1. Plaintiffs Have Identified Numerous Members Qualified to Sue in their Own Right**

Under the first element of the *Hunt* standard, it is black letter law that an association provides the requisite showing of injury when it identifies *one, and only one*, of its members who has standing to sue in his or her own right.<sup>5</sup> In this action, Plaintiffs have far exceeded this modest requirement.

In their Amended Schedule A, Plaintiffs identify forty-nine union members who were likely injured by § 97.055's failure to include a grace period. (*See Ex. 51.*) These individuals were identified by comparing information provided by Defendant with Plaintiffs' membership lists. Because Defendant's information was incomplete, Plaintiffs' were unable to identify with absolute certainty which of these members suffered actual injury.<sup>6</sup> Defendant's own affidavits confirm, however, that at least twenty-nine members were injured in fact. (*See Roberts Decl.*<sup>7</sup>) But for § 97.055's failure to include a grace period, these members would have been able to correct their applications, register, and vote. Additionally, Plaintiffs have produced Declarations of three union members injured by the lack of a grace period. Such evidence is appropriate to establish standing on a motion for summary judgment.<sup>8</sup>

These past injuries, caused by § 97.055's lack of a grace period, prove that Plaintiffs' members will be injured again if the statute remains uncorrected. These injuries are imminent and based on the concrete evidence of actual prior injury to union members and thousands of other voters

<sup>4</sup> *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 282 (1986) (quoting *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) and upholding associational standing for the UAW).

<sup>5</sup> *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1171 (11th Cir. 2006) ("All [plaintiff] needs to establish associational standing is one person . . . who can establish standing"); *Sierra Club v. Johnson*, 463 F.3d 1269, 1279 (11th Cir. 2006) (associational standing based on one member); *Sierra Club v. Tennessee Valley Authority*, 430 F.3d 1337, 1344 (11th Cir. 2005) (same); *American Civil Liberties Union of Florida, Inc. v. Miami-Dade County School Bd.*, 439 F. Supp. 2d 1242, 1264 (S.D. Fla. 2006) (same); *Access 4 All, Inc. v. Atlanta Hotel Condominium Assoc., Inc.*, No. 04-61740, 2005 WL 5632057, at \*5 (S.D. Fla. Aug. 17, 2005) (same).

<sup>6</sup> Plaintiffs' do not represent, by any means, that Amended Schedule A constitutes a complete list of injured union members. To the contrary, many more members may be injured. Plaintiffs identified numerous union members who were likely injured in Broward and Miami-Dade counties based on data provided by the former defendant Supervisors. *See* Amended Schedule A, Ex. 51.

<sup>7</sup> Attached to Secretary of State's Motion for Summary Judgment and Incorporated Memorandum of Law (hereinafter "Def.'s Mem.").

<sup>8</sup> *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envir. Svc., Inc.*, 528 U.S. 167, 181-184 (2000) (finding associational standing based on evidence submitted through affidavits and deposition testimony).

as described above. “[W]hen the threatened acts that will cause injury are authorized or part of a policy, it is significantly more likely that the injury will occur again.” *31 Foster Children v. Bush*, 329 F.3d 1255, 1266 (11th Cir. 2003). “Article III standing does not require a plaintiff to wait until an injury occurs to bring suit.”<sup>9</sup>

The District Court’s opinion in *Florida Democratic Party v. Hood* relates precisely:

Under these principles [of associational standing], plaintiff has standing to assert, at least, the rights of its members who will vote in the November 2004 election. Plaintiff has not identified specific voters who will seek to vote at a polling place that will be deemed wrong by election workers, but this is understandable; by their nature, mistakes cannot be specifically identified in advance. Thus a voter cannot know in advance that his or her name will be dropped from the rolls, or listed in an incorrect precinct, or listed correctly but subject to human error by an election worker who mistakenly believes the voter is at the wrong polling place. It is inevitable, however, that there will be such mistakes. The issues plaintiff raises are not speculative or remote; they are real and imminent.

*Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1079 (N.D. Fla. 2004). Similarly, in *Sandusky County Democratic Party v. Blackwell*, the Sixth Circuit found it “understandable” that plaintiffs did not identify specific voters that would be harmed in future elections by a provisional ballot policy because “mistakes cannot be specifically identified in advance.” 387 F.3d 565, 573-74 (6th Cir. 2004). The Court stated that “[i]t is inevitable, however, that there will be such mistakes,” and ruled that plaintiffs’ future injuries “are not speculative or remote; they are real and imminent.” *Id.*<sup>10</sup> In his Motion, Defendant argues that Plaintiffs cannot assert associational standing because the injured union members for whom Plaintiffs submitted declarations could not bring suit in their own right. (Def.’s Mem. 5-6) Defendant is mistaken.

Marie Gayle Kirlew is a member of the SEIU and has standing to sue. She was unable to correct her timely submitted voter registration application before the close of books for the 2006 general election. As a result, she was denied the right to vote. (*See Kirlew Decl., Ex.13.*) Defendant argues that Kirlew’s application was not incomplete because she did not check a box but instead wrote “no” next to the check boxes, and that her application was entered correctly by the

<sup>9</sup> *Alabama-Tombigbee Rivers Coal. v. Norton*, 338 F.3d 1244, 1253 (11th Cir. 2003) (internal citations omitted) (holding that “[w]hile the [plaintiff’s] evidence of past events . . . might by itself be insufficient to establish standing for prospective relief, in this context the evidence illustrates” that plaintiff’s members has been injured and will continue to be injured).

<sup>10</sup> Additionally, the Supreme Court recently found standing for a parents group despite their inability to identify in advance children harmed by a school district’s “racial tiebreaker” policy. *See Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2750-51 (2007). These cases clearly establish that Plaintiffs have appropriately established standing as to the future injury of their members.

election official processing her application. (Def.'s Mem. 6.) How Kirlew's application was processed is not material, however. Kirlew received actual notification that her application was incomplete. Consequently, she "did not believe that [she] was registered to vote because [her] application was incomplete" and was therefore denied the right to vote. (Kirlew Decl., Ex. 13.) Had a grace period been in place, Kirlew's corrected application would have been processed and she would have received a voter registration card.

Patricia Anne Benvenuto is a member of the AFL-CIO. She could not vote in 2006 because she received notice of her incorrect application too late to correct it before the close of books. (Benvenuto Decl., Ex. 6.) Defendant asserts that Ms. Benvenuto's application was incomplete not because of a check box deficiency but because her social security did not match. (Def.'s Mem. 6.) Defendant further states that she could have voted with a provisional ballot. (*Id.*) Both arguments are beside the point. Ms. Benvenuto was notified by the Miami-Dade Supervisor of Election's office that her application was incomplete. (Benvenuto Decl., Ex. 6.) She then sent back a corrected application, and never received a voter registration card. (Benvenuto Decl., Ex. 6.) Had a grace period been in place, her corrected application would have been processed and she would have received a voter registration card.

Bladimir Hernandez is also a member of the AFL-CIO. He submitted his voter registration application in September 2006. He then received a notification that his application was incomplete. He submitted a complete application but did not receive his voter card until after the November 2006 election. (Hernandez Decl., Ex. 11.) Defendant asserts that Mr. Hernandez corrected his application before the close of books and his voter registration card was issued before the election. (Def.'s Mem. 6.) While the card may have been issued, Mr. Hernandez did not receive it until after the election. (Hernandez Decl., Ex. 11.)

Defendant also weakly asserts that because the elections are months away, Plaintiffs' future injury is insufficiently imminent to establish standing. Imminence is not merely a reference to timing, but is more importantly a measure of the concreteness and certainty of a future injury. *31 Foster Children v. Bush*, 329 F.3d 1255, 1266 (11th Cir. 2003). Plaintiffs have established that an injury to their members here is all but inevitable. Even as to timing, Plaintiffs are not required to rest on their rights until the eve of election – if they did so, the possibility of receiving meaningful relief, both from the courts and from officials actually administering the elections, would be far less likely.

**2. The Interests Protected by Plaintiffs in this Action Are Indisputably Germane to Plaintiffs' Organizational Purposes**

Defendant does not dispute that the interests protected by Plaintiffs are germane to their organizational purpose, so there can be no genuine issue of material fact as to this issue. A recent voter registration case in this district, involving many of the same parties, requesting the same relief, and decided under the same standard, is particularly instructive in this action. In *League of Women Voters of Florida v. Cobb*, Plaintiff Unions in the present case challenged Florida's third-party voter registration statute which imposed significant fines for failing to timely submit voter registration applications. 447 F. Supp. 2d 1314 (S.D. Fla. 2006). In *Cobb*, the court made specific findings of fact as to each of the unions in this lawsuit, granted them associational standing, and ruled in their favor.<sup>11</sup>

*Cobb's* findings are confirmed by the undisputed evidence in this case. Plaintiffs' constitutions establish that voter registration is a central component of their missions.<sup>12</sup> Union officials reiterated in Declarations and at depositions that registration is a central value of the unions.<sup>13</sup> For these reasons, there is no issue of fact as to whether Plaintiffs' organizational purposes are germane to the issues in the case.

**3. Plaintiffs Do Not Require the Participation of Individual Union Members**

Defendant does not dispute that the asserted relief does not require the participation of individual union members. Plaintiffs in this action seek injunctive and declaratory relief which renders member participation unnecessary. Plaintiffs are "not seeking monetary damages but only injunctive relief; therefore as the Court noted in *U.A.W. v. Brock*, the association does not need the participation of its members to bring the suit."<sup>14</sup>

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<sup>11</sup> *Id.* (finding that missions of the Florida AFL-CIO, AFL, AFSCME Council 79 and SEIU were germane for purposes of standing).

<sup>12</sup> *See, e.g.*, AFL-CIO Constitution, Ex. 41 at 5 (an objective and principle of the AFL-CIO is "to encourage workers to register and vote, to exercise their full rights and responsibilities of citizenship . . .")

<sup>13</sup> *See, e.g.*, Sullivan Dep. 59-60 (voter registration is central to the SEIU's value of civic engagement and participation in the electoral process)

<sup>14</sup> *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1571 (11th Cir. 1991); *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996) (injunctive relief does not require the participation of individual members); *Disability Advocates and Counseling Group, Inc. v. Betancourt*, 379 F. Supp. 2d 1343, 1356 (S.D. Fla. 2005) (King, J.) (recognizing that under the third prong of *Hunt* "where only declaratory, injunctive (or some other form of prospective relief) is sought. . . organizations . . . have Article III standing to sue.")

## B. Plaintiffs Have Organizational Standing to Sue

Plaintiffs, who collectively represent thousands of working people in Florida, clearly have standing on their own behalf in this action. Plaintiffs have organizational standing “to challenge conduct that impedes its ability to attract members, to raise revenues, or to fulfill its purposes.”<sup>15</sup> To establish organizational standing, Plaintiffs must show they have suffered “concrete and demonstrable injury” that “constitutes far more than simply a setback to the organization’s abstract social interests.” *Havens Realty Corp v. Coleman*, 455 U.S. 363, 379 (1982). Here, Plaintiffs’ efforts to assist members in registering to vote have been frustrated by Florida’s prohibition of a grace period. Plaintiffs have expended significant resources to conduct voter registration and to counteract the repercussions of Florida’s failure to provide a grace period. These are not speculative future injuries, or a “mere diversion of resources” as Defendant asserts without citing *any authority from the Eleventh Circuit*, (Def.’s Mem. 9), but rather actual, verifiable resources that the unions have already expended. For these reasons, Plaintiffs have organizational standing to sue.

Plaintiffs dedicate substantial resources to registering their members to vote. During discovery, representatives from each Union Plaintiff testified as to the effect of the prohibition of a grace period has on their union’s missions.<sup>16</sup> The testimony of these representatives is corroborated by specific documentary evidence showing that Plaintiffs’ committed millions of dollars to voter registration efforts.<sup>17</sup>

Moreover, the evidence clearly demonstrates that Plaintiffs devoted resources to voter registration activities that specifically concern the lack of a grace period in a number of ways. Plaintiffs expended resources in tracking, and keeping data on incomplete applications.<sup>18</sup> Plaintiffs

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<sup>15</sup> *Hood*, 342 F. Supp. 2d at 1079 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (holding that organization suffers injury independent of that suffered by individuals when it expends resources as a proximate result of defendant’s illegal conduct that would otherwise have been devoted to other activities)). Organizations such as the Union Plaintiffs regularly litigate on their own behalves in voting rights cases. See e.g., *Charles H Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1353 (11th Cir. 2005) (organization injured by the refusal of officials to accept voter applications that the organization had collected and sent for processing); *Assoc. of Comm. Org’s for Reform Now v. Fowler*, 178 F.3d 350 (5th Cir. 1999) (finding genuine issue of material fact that ACORN has expended resources counteracting Louisiana’s failure to make voter registration materials available at public aid offices).

<sup>16</sup> Sullivan Dep. 59:21-60:18; see also Gonzalez Dep. 83; Dion Dep. 58:17-59:1.)

<sup>17</sup> See Ex. 47, AFL 1535-36 (listing contributions and payments for voter registration drives); Dion Dep. 50:07-60:01 (discussing efforts to register voters); Ex. 45, AFSME 1231 (grant to fund voter registration.)

<sup>18</sup> See, e.g., Ex. 42, AFL 1139 (tracking data from Broward County and Miami-Dade County registration applications in 2004); Ex. 47, CL-79 1191-1260 (voter registration data from Duval County in 2004.)

also worked to prevent the submission of incompletes and work to expedite the correction process.<sup>19</sup>

As the representative of the SEIU stated in his deposition:

[T]he problem with getting submitted voter registration applications processed created significant drains on our resources at a very late stage in the election cycle, so we were forced to take people from other activities and have them go and essentially recontact potential voters who had already been contacted before to assist them in filling out their application, and that we had to do that on a relatively short notice because of the imminent book closing deadline.

(Sullivan Dep. 63:06-63:15)

In his Motion, Defendant relies on inapposite cases from other jurisdictions to argue that Plaintiffs lack organizational standing in this action. Plaintiffs did not “manufacture injury” as baselessly asserted by Defendant. (Def.’s Mem. 9.) Nor does the injury suffered by the Union Plaintiffs relate to the litigation expenses, related to bringing this action, as Defendant would have the Court think.<sup>20</sup> Lastly, unlike *Common Cause/Georgia v. Billups*, where a district court determined that the NAACP lacked organizational standing because it “simply presented testimony indicating that at some undetermined time in the future, it may have to divert unspecified resources to various outreach efforts,” the Union Plaintiffs here demonstrate organizational standing based on concrete injury that has occurred and will occur at determined times. *Common Cause of Georgia v. Billups*, 504 F.Supp.2d 1333, 1373 (N.D. Ga. 2007).<sup>21</sup>

**II. Actual Success On The Merits: Without A Grace Period Fla. Stat. § 97.055 Unconstitutionally Burdens Plaintiffs’ Right To Register And Vote Under Anderson**

On its Order on the Motion to Dismiss this Court has decided that *Anderson v. Celebrezze*, 460 U.S. 780 (1983) sets forth the appropriate legal standard to evaluate the constitutionality of § 97.055. (D.E. No. 201 at 11-12.) There is no doubt that *Anderson’s* balancing

<sup>19</sup> See, e.g., Dion Dep. 52:12-53:1 (AFL-CIO members trained to check voter registration forms carefully before submitting them); Gonzalez Dep. 25:18-26:1 (AFSCME representatives advocated on behalf of members who submitted incomplete applications); Sullivan Dep. 15:3-20:6 (SEIU paid staff reviewed thousands of voter registration applications to check for errors and contact voters).

<sup>20</sup> Cf. *Nat’l Taxpayers Union v. U.S.*, 68 F.3d 1428, 1433 (D.C. Cir. 1995) (organizational standing was lacking where the evidence of injury of decreased fundraising results because of a prospective federal tax policy, was entirely speculative); *Assoc. for Retarded Citizens v. Mental Health & Mental Retardation Center Bd. Of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994) (organizational standing was rejected because the only evidence of injury asserted concerned the cost of the litigation).

<sup>21</sup> Defendant’s conclusory assertion that Plaintiffs’ did not properly plead standing, (Def.’s Mem. 8), is utterly without merit. (See Third Amended Complaint, D.E. No. 170 at 29.)

test controls the constitutional analysis whether a state election law violates the First and Fourteenth Amendment.<sup>22</sup>

When assessing the constitutionality of an election law, a court “must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate.” *Anderson* at 789. Next, “[a court] must identify and evaluate *the precise interests* put forward by the State as justifications for the burden imposed by its rule.” *Id.* (emphasis added). Finally, “[i]n passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider *the extent to which those interests make it necessary to burden the plaintiff’s rights.*” *Id.* (emphasis added). Even when pursuing a legitimate interest, “a State may not choose means that unnecessarily restrict constitutionally protected liberty,” and a State must “adopt the least drastic means to achieve [its] ends.”<sup>23</sup> As this Court observed in its Order, “a *heavy burden* of justification is on the State... the statute will be *closely scrutinized* in light of its asserted purposes...”<sup>24</sup>

**A. § 97.055’s Failure To Permit A Grace Period Severely Burdens The Constitutional Rights Of Plaintiffs And The Voting Public Of Florida**

Under *Anderson*, this Court must “consider the character and magnitude of the asserted injury” that the plaintiffs seek to vindicate. 460 U.S. at 789. Further, where, as here, plaintiffs seek injunctive relief, they must show that there is a “substantial threat of irreparable injury.”<sup>25</sup>

Defendant attempts to minimize the harm to union members and voters of Florida and blame them for their own injury. (Def.’s Mem. 16-17.) The undisputed evidence, however, demonstrates far more than simply a “substantial threat” of vote denial in the 2008 presidential election cycle – it is a near certainty<sup>26</sup> that hundreds even thousands, of new voters in each of the former defendant counties will be denied the right to vote due to innocent mistakes.

<sup>22</sup> See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 213-14 (1986); *New Alliance Party of Ala. v. Hand*, 933 F.2d 1568, 1574 (11th Cir. 1991); *Fulani v. Krivanek*, 973 F.2d 1539, 1543 (11th Cir. 1992); *Common Cause of Georgia v. Billups*, 2007 WL 2601438 (2007).

<sup>23</sup> *New Alliance Party of Ala. v. Hand*, 933 F.2d 1568, 1574 (11th Cir. 1991), quoting *Illinois Elections Board v. Socialist Workers Party*, 440 U.S. 173, 185 (1979).

<sup>24</sup> (Order on Motion to Dismiss, D.E. No. 201 at 12, fn. 4, quoting *Beare v. Briscoe*, 498 F.2d 244, 246-47 (5th Circuit 1974) (emphasis in original).)

<sup>25</sup> *N.E. Fla. Ch. Of Ass’n of Gen. Contr. Of Am. v. City of Jacksonville*, 896 F.2d 1283, 1284-85 (11th Cir. 1990); *League of Women Voters of Florida v. Cobb*, 447 F. Supp. 2d 1314, 1331 (S.D. Fla. 2006).

<sup>26</sup> A showing of future injury to a “near certainty” of course far exceeds what is necessary under the law, in spite of the Secretary’s suggestion to the contrary. (Def.’s Mem. 6.)

### 1. Plaintiffs' Injury, Vote Denial, Is Severe and Irreparable in Character

Being denied a right to vote is an irreparable injury.<sup>27</sup> Vote denial need not be total or absolute to create a constitutionally cognizable injury. *Dunn v. Blumstein*, 405 U.S. 330, 331 (1972).

Applicants who submit voter registration applications with mistakes or omissions to any mandatory section of the form are ineligible to vote until such deficiencies are corrected.<sup>28</sup> It is undisputed that applicants completing voter registration forms do not intentionally complete them incorrectly.<sup>29</sup> It is also undisputed that the overwhelming majority of applicants are never found ineligible to vote. (See Korman Dep. 115, 173-174.) With these facts in mind, it is clear that § 97.055's failure to provide a grace period generally injures citizens of Florida that are (a) eligible to vote, (b) who intend to vote, and (c) submitted their application in a timely manner.

Additionally, undisputed evidence demonstrates that inadvertent mistakes or omissions in voter registration applications are not simply the fault of the applicant. Several election officials testified in their depositions that the language used in Florida's application was confusing.<sup>30</sup> Additionally, numerous election officials had difficulty defining key terms on the form.<sup>31</sup>

Defendant nevertheless attempts to tie the injuries in this case to those described in cases involving registration deadlines, where voters' plight was caused "by their failure to take timely steps to effect their enrollment."<sup>32</sup> The injured parties at issue in this case, unlike those in *Rosario*, will have submitted their applications *in a timely manner prior to the registration deadline*.

Defendant also inappropriately likens the injuries in this case to those described in *Common Cause of Georgia v. Billups*, 504 F.Supp.2d 1333, 1373 (N.D. Ga. 2007), and *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7<sup>th</sup> Cir. 2007). These cases, concerning photo identification requirements, are from other jurisdictions not controlling here. Moreover, they are distinguishable: in *Billups* and *Crawford*, the courts found the injuries at issue to be speculative and avoidable. Here, Plaintiffs' injuries are imminent and concrete. See *infra*. 4-5. Individuals threatened with vote denial in this case are already making all efforts to register to vote and to do so

<sup>27</sup> *Hood*, 342 F. Supp. 2d at 1082 ("A person who is denied the right to vote suffers irreparable injury. One need look no further than the 2000 election to confirm that that is so. .... The problem was irremediable."); *Wexler v. Anderson*, 452 F.3d 1226, 1231 (11th Cir. 2006) (noting that "[t]he right to vote is fundamental, forming the bedrock of our democracy."); *Ill. Bd. Of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("[V]oting is of the most fundamental significance under our constitutional structure.")

<sup>28</sup> See, e.g., Fla. Stats. §§ 97.052(6), 97.053(2), 97.053(5).

<sup>29</sup> See Bedeni Dep. 96; Bradshaw Dep. 144-45; Kolodny Dep. 169; Korman Dep. 172; Sola Dep. 41-42.

<sup>30</sup> See, e.g., Anderson Dep. 115; Cowles Dep. 82-83; Korman Dep. 204.

<sup>31</sup> See, e.g., Bradshaw Dep. 75; Korman Dep. 203; Tanko Dep. 189.

<sup>32</sup> *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973); *Burns v. Fortson*, 410 U.S. 868 (1973).

on time, and cannot take additional steps to avoid the threatened vote denial, because the character of the injury involves an unforeseen error or omission.<sup>33</sup>

The failure of § 97.055 to provide a grace period to applicants who have taken all necessary steps to complete their applications in a timely manner imposes a severe constitutional burden. The injured parties at issue in this case will clearly suffer a severe and irreparable injury, and Defendant's efforts to "blame the victim" should not be credited.

**2. The Statute Burdens Thousands, if Not Tens of Thousands of Voters During Each Election Cycle**

It is an undisputed fact that there is a significant increase in applications prior to book closing in each federal election cycle and that a significant number of incomplete applications by voters who are otherwise eligible to vote are submitted during the weeks prior to book closing. The Supervisors' Joint Declaration thus states as follows:

10. During federal election cycles in 2004 and 2006, the number of voter registration applications that our offices received increased sharply in the weeks shortly before the book-closing deadline, for many reasons.

11. Many voter registration applicants who were otherwise eligible to vote submitted incomplete or incorrect voter registration applications in the weeks leading up to the bookclosing deadline. Many of these persons were not able to correct their applications in order to be able to vote in the upcoming election.

12. During the 2004 and 2006 federal election cycles, in the weeks leading up to the book-closing deadline, the number of voter registration applicants submitting incomplete or incorrect voter registration applications in our respective Counties ranged from the hundreds to thousands in each County.

13. The Supervisors expect that, given the current lack of a grace period, many applicants who timely submit an incomplete application for the 2008 federal election cycle, may be unable to correct their application in time to become registered to vote in the 2008 federal election cycle.

(Supervisors' Decl., Ex. 2 at ¶¶ 10-13.) The Supervisors undisputed affirmations under oath should be sufficient to establish the great magnitude of the problem, as well as a "substantial threat" of injury to a large number of voters.

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<sup>33</sup> *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (A "voter cannot know in advance that his or her name will be dropped from the rolls, or listed in an incorrect precinct, or listed correctly but subject to a human error by an election worker who mistakenly believes the voter is at the wrong polling place."); *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404, 422 (E.D.Mich.2004) ("The exact identity of the group of qualified voters who will cast provisional ballots from incorrect polling places, by definition, cannot be known.").

Based on Defendant's own data from the 2006 election cycle, Plaintiffs estimate that at least 11,700 voters filed incomplete applications during the thirty days prior to the close of books. (Nolan Decl. ¶¶ 3, 4, and Ex. A thereto.) It is likely these voters did not receive notice in time to correct their applications prior to the close of books, as election officials can take approximately one month to notify voters of deficiencies in their applications. (Kolodny Dep. 154-55; Korman Dep. 177.) The numbers for the 2008 presidential election will be much higher.

The harm wrought by § 97.055 is not simply a matter of estimation. In Miami-Dade County, for example, 368 notices of incomplete applications were sent on October 10, 2006, the actual day of the close of books. (Nolan Decl. ¶ 7.) Because they were sent on the book-closing date, the notices pertained to applications that were by definition submitted on time. Similarly, applicants would by definition receive the notices after the book closing date, thereby precluding them from making corrections to their application and voting in the upcoming election. All told, Miami-Dade received at least 1,514 incomplete voter registration applications in the thirty days prior to book closing in 2006 and 3,052 incomplete voter registration applications within thirty days prior to book closing in 2004. (Nolan Decl. ¶¶ 5, 6, and Ex. B thereto)<sup>34</sup>

Similarly, in Broward county in 2004, almost 400 notice letters were mailed within four days of book closing. (Nolan Decl. ¶ 8, and Ex. C thereto.) It is highly likely that all of these notice letters pertained to applications received prior to book closing. While Plaintiffs received no data from Broward on incompletes in 2006, Broward County "searchholds" indicate that at a minimum 1,508 incomplete applications were received by the Broward Supervisors' office in 2004 within thirty days prior to book closing. (Nolan Decl. ¶ 9, and Ex. D thereto.)

Given the significant number of voters affected by the failure to provide a grace period, it comes as no surprise that some of these injured voters were union members.<sup>35</sup> Still, Defendant's assertion that the Court's inquiry should focus on union members for the purpose of assessing injury is plainly incorrect. Defendant's analysis conflates burden analysis under *Anderson* with the standing analysis of injury. While standing requires a showing of injury *to the plaintiff*, *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 180-184 (2000), the burden analysis under *Anderson* is a much broader inquiry that does not limit its focus to the plaintiff. *See, e.g., Anderson*, 460 U.S. at 789-96 (assessing impact of statute on voting public and

<sup>34</sup> Using the Secretary's own data for 2006, the number of incompletes for that period is 2,633. Nolan Decl. ¶¶ 3, 4, and Ex. A thereto.

<sup>35</sup> See Declarations of Bladimir Hernandez, Ex. 11, Patricia Anne Benvenuto, Ex. 6, and Marie Olive Gayle Kirlew, Ex. 13.

“pervasive national interest in the selection of candidates for national office . . . .”); *Clingman v. Beaver*, 544 U.S. 581, 591 (2005) (considering injury to members of political party not participating in lawsuit).<sup>36</sup>

**B. Fla. Stat. § 97.055’s Failure to Include a Grace Period Cannot be Justified as Necessary to Achieve Any Legitimate State Interest**

The law in this Circuit with regard to *Anderson* is clear: to justify an election regulation that burdens constitutional rights, the State must demonstrate that the challenged regulation is necessary to achieve a legitimate state interest.<sup>37</sup> If the state cannot establish a clear connection between the regulation and the proffered interest, it will be struck down.<sup>38</sup>

Two Eleventh Circuit cases decided under *Anderson* provide further clarification. In *New Alliance Party of Alabama v. Hand*, minor parties challenged an Alabama statute requiring them to meet early signature requirements. 933 F.2d at 1570. In *Fulani*, minor parties and independent candidates challenged a Florida statute denying them the option to waive certain signature-verification fees. 973 F.2d at 1540. In both cases, the state advanced interests that both courts acknowledged as legitimate, including regulating the election process and avoiding voter confusion. *Hand*, 933 F.2d at 1576; *Fulani*, 973 F.2d at 1546. Nevertheless, both statutes were found to be unconstitutional.

In *Hand*, even though the court found the burden imposed on the plaintiffs to be “not insurmountable,” it nevertheless ruled that while “[t]he Court recognizes that the State has a legitimate interest in regulating the procedures by which minor parties and independents gain access to the ballot . . . a State must ‘adopt the least drastic means to achieve [its] ends.’” 933 F.2d at 1576 (quotation omitted). Similarly, in *Fulani*, the court conceded that “[t]he state asserts interests that are indisputably important,” but found that “[t]he problem is that the state has plucked these interests

<sup>36</sup> Defendant also tries to limit the Court’s consideration in this action to only those injuries caused by § 97.055’s failure to include a grace period *with regard to checkboxes*. The Court should reject this self-serving limitation. Discovery in this case has been by no means limited solely to checkboxes, therefore Defendant cannot claim he lacked of notice of this issue. See *Berquist v. Fidelity Info. Services, Inc.*, 197 Fed. Appx. 813, 814-5 (11th Cir. 2006) (ruling on issue not contained in the pleadings proper given that issue was covered in discovery); *Hassan v. United States Postal Service*, 842 F.2d 260, 263 (11th Cir. 1988) (proper for court to hear evidence where issue was addressed in discovery, thus ). Moreover, this case is brought in equity and concerns matters of significant public interest; limiting the evidence in this manner would prevent the Court from providing complete relief, forcing it to administer justice in piecemeal fashion. “Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. ‘The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.’” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982), quoting *Brown v. Swann*, 35 U.S. 497, 503 (1836).

<sup>37</sup> See *Hand*, 933 F.2d at 1574; *Fulani v. Krivanek*, 973 F.2d 1539, 1544 (11th Cir. 1992); *Cobb*, 447 F. Supp. 2d at 1337.

<sup>38</sup> See *Hand*, 933 F.2d at 1576; *Fulani*, 973 F.2d at 1544; *Cobb*, 447 F. Supp. 2d at 1337.

from other cases without attempting to explain how they justify the discriminatory classification here at issue.” 973 F.2d at 1546. Analyzing *Hand* and *Fulani*, a Florida district court has noted that “[t]hese two cases make it clear that a court must carefully scrutinize the interests asserted by the state and ascertain that the interests asserted justify the statute at issue.” *U.S. Taxpayers Party of Florida v. Smith*, 871 F. Supp. 426, 436 (N.D. Fla. 1993). Here, a right more important than ballot access is at issue, therefore Defendant’s justifications must be assessed even more carefully than in *Hand* and *Fulani*.

*Cobb* is particularly instructive here. In that case, the court analyzed Florida’s third-party voter registration statute under *Anderson*, examining whether the law was necessary to advance the interests asserted by the state. *Id.* at 1337-39. While the court found that the state interest, protecting citizens’ right to vote, was indisputably important, the state failed to provide “any evidence much less an explanation for the necessity of the [statute].” *Id.* at 1338. Accordingly, the court ruled the law was unconstitutional.<sup>39</sup>

The record here indisputably demonstrates that there is no state interest rationally related to maintaining § 97.055 without a grace period. Even if such an interest could be identified, the evidence clearly shows that refusing to provide a grace period is not necessary to achieve that interest.

**1. The Declaration of the Former Defendant Supervisors of Elections Clearly Establishes That There Is No Legitimate State Interest in Prohibiting A Grace Period**

The former defendant Supervisors of Elections are the principal election officials in their respective counties and are responsible for implementing, administering and enforcing Florida election law. (*See Ex. 2.*) By Defendant’s own admission, the Supervisors are best situated to offer evidence as to the existence of any legitimate state interest in maintaining § 97.055 without a grace period, and to the necessity of the same.<sup>40</sup>

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<sup>39</sup> The Court also found that any voter registration problems arising from third party organizations were *de minimus*, and that the principal difficulties in the 2004 presidential election were the result of unexpectedly high voter registration activity. *Id.* at 1337.

<sup>40</sup> In his Memorandum of Law opposing the Supervisors’ Motion for Judgment on the Pleadings, Defendant writes, “[plaintiffs] presumably hope to prove that the Supervisors could reasonably administer elections...with some sort of grace period...Given the statutory duties of the Supervisors, they are the appropriate parties to demonstrate the basis for the challenged law.” (D.E. No. 225 at 3.) In his Response to Plaintiffs’ First Set of Interrogatories, Defendant concedes his lack of knowledge with regard to voter registration after the book-closing date, and defers to the Supervisors. *See* Def. Browning’s Resp. to Pl. Int., Ex. 2 at 9. Finally, in their deposition testimony, Defendant’s staff repeatedly deferred to the knowledge and experience of the Supervisors. *See* Bradshaw Dep. 48, 124-26, 128-29, 133; Roberts Dep. 113-14; Taff Dep. 41-42, 42-43, 175-77, 180-82.

The Supervisors' position is clear and unambiguous: "none of the Supervisors know of any policy precluding the provision of a grace period." (*See* Ex. 1 ¶ 21.) Additionally, "[T]he Supervisors believe that if the law changed to allow a grace period, and remained the same in all other respects, providing the grace period would not interfere with the orderly administration of elections, would not unduly burden the respective offices' resources, and would not interfere with other election-related activities between the book-closing deadline and Election Day. The Supervisors have no information, data or evidence to support the conclusion that a grace period as described herein would cause an increase in voter fraud." (*Id.* ¶ 22.) Finally, the Supervisors have agreed, should the law be changed to allow it, that they will implement the grace period at issue in this action. (*Id.* ¶ 19.) As the preeminent authorities on voter registration, the Court should give great weight to the Supervisors statements.

The Declaration of Okaloosa County Supervisor of Elections Pat Hollarn offered by Defendant does not create a genuine dispute as to this issue. In her Declaration, Supervisor Hollarn speaks almost exclusively to the twenty-nine day registration deadline, which is not at issue in this action. The Declaration contains a single reference to the grace period at issue in this case. Supervisor Hollarn claims such a policy is unnecessary, but fails to identify a legitimate state interest precluding the implementation of a grace period. (*See* Def.'s Mem., Hollarn Decl. at 6.) Lastly, at her deposition, Ms. Hollarn testified that, if required to by law, she would be able to implement a grace period, which would simply require hiring additional staff. (*See* Hollarn Dep. 160-61.)

The Declaration of Defendant himself similarly fails to create a genuine issue of material fact.<sup>41</sup> As with Supervisor Hollarn, Defendant barely attempts to argue the real issue in this case: § 97.055's failure to provide a grace period. When the grace period is mentioned, Defendant addresses the grace period only fleetingly, citing boilerplate reasons why such a policy cannot be followed and providing no concrete facts supporting his arguments.

The Declarations offered by Defendant do not create an issue of material fact in case, therefore the Joint Declaration of the Supervisors establishes that § 97.055's failure to provide a grace period is unreasonable as a matter of law.

## **2. The Declaration of the Former Defendant Supervisors of Elections is Supported by Other Evidence Gathered in Discovery**

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<sup>41</sup> Plaintiffs were surprised to find a Declaration from the Secretary himself among these papers, as Plaintiffs were specifically prevented from deposing him during discovery. Because Defendant is an interested party who has not been deposed, the Court would need to assess his credibility and demeanor at trial before crediting his statements. For these reasons alone, Defendant Browning's Declaration should be disregarded.

The statements of the former defendant Supervisors, as compelling as they are, should not be viewed in isolation, but considered together with all the other uncontested evidence demonstrating that § 97.055's failure to provide a grace period is not connected to any legitimate governmental interest nor necessary. Either would suffice to establish the absence of a genuine dispute of material fact in this matter, but when viewed together, the evidence is overwhelming.

First, the evidence gathered during discovery reinforces the statements of the Supervisors as to the necessity of precluding a grace period. In their Declaration, the Supervisors state they know of no reason precluding the use of a grace period. (*See* Ex. 1 ¶ 21.) The Supervisors and their staff testified consistently on this point at their depositions.<sup>42</sup> Supervisor Sancho also agreed with the Supervisors. (*See* Sancho Dep. 109-10.) Even members of *Defendant's staff* appeared to agree that prohibiting a grace period was indefensible.<sup>43</sup> The Supervisors also state in their Declaration that providing a grace period would not interfere with the orderly administration of elections, unduly burden the resources of their offices, or interfere with other election-related activities. (*See* Ex. 1 ¶ 22.) These statements were also supported by deposition testimony taken during the discovery period.<sup>44</sup> Again, Supervisor Sancho was in agreement.<sup>45</sup> Robert Sweat, Supervisor of Elections for Manatee County, agreed as well. (*See* Sweat Decl., Ex. 14 ¶ 9.)

Lastly, Supervisors stated that they possessed "no information, data or evidence to support the conclusion that a grace period... would cause an increase in voter fraud." (*See* Ex. 1 ¶ 5.) This position is amply supported by the evidentiary record. (*See, e.g.*, Duval County Resp. to Plaintiffs' Second Set of Interrogatories, Ex. 3 at 8.) Again, this point was conceded by Defendant's staff in their depositions. (*See* Bradshaw Dep. 48, 76-77; Taff Dep. 165-66; Roberts Dep. 172-73.)

Defendant cannot argue that prohibiting a grace period is necessary when, in previous election cycles, a grace period has been employed in several counties without incident. In 2005, prior to the amendment of § 97.055, the Florida election law was ambiguous as to whether a grace period was permissible. In 2004, Supervisors of Elections in Duval, Hillsborough, Leon, and Manatee counties allowed eligible voters to correct missing or incorrect information in their voter registration applications after the book closing date. (*See* Carlberg Decl., Ex. 8 ¶ 6; Johnson Dep. 21; Sancho Dep. 100-01; Sweat Decl., Ex. 14 ¶ 2.) Allowing corrections after the close of books,

<sup>42</sup> *See* Cowles Dep. 141-42; Holland Dep. 81; Kolodny Dep. 137; Korman Dep. 161-162; Snipes Dep. 116.

<sup>43</sup> *See* Taff Dep. 159 ("Q: ...Other than the statute forbids it, can you give me a reason why there should not be a grace period as described? THE WITNESS: No.").

<sup>44</sup> *See, e.g.*, Sola Dep. 92-93 ("Q... So, in your opinion, implementing a grace period is doable? ... THE WITNESS: Yes.").

<sup>45</sup> *See* Sancho Dep. 41 ("A. It's certainly doable. The system would allow us to make changes all the way through election day.").

(i.e. employing a grace period), did not interfere with the orderly administration of elections or unduly burden the respective office's resources. (*See* Johnson Dep. 27-28; Sweat Decl., Ex. 14 ¶ 2.) The previous experience of these counties is a critical piece of evidence, as it provides the Court with actual evidence as to the effect of a grace period in practice, as opposed to predictions, however well-informed they may be, about the future.

Defendant, in his Memorandum and through his Declarations, attempts to paint a picture of a rigid system under great stress, where any change could put the entire system in jeopardy. This is clearly not the case. Documents generated by Defendant candidly admit this fact. In his document entitled "FVRS Guide," it states as follows:

This would be a very straightforward process if all the counties printed precinct registers at the same time and if the statutorily defined book closing was truly a freeze on the registration updates for the period between book closing and the election. In fact, book closing only controls the effective dates for party changes (for primaries) and the eligibility of new voters. Address changes, other determinations of eligibility such as deaths, early and absentee voting and valid registrations received after the book closing all effect the inclusion of voters on a precinct register at any point in time. The accuracy of precincts [sic] registers necessitates adjustments to very fluid and dynamic voter registration activities.

(*See* Ex. 50, p. 62.) When confronted with this document in depositions, election officials unanimously agreed with its description of the electoral process between the book-closing date and Election Day. (*See, e.g.,* Cowles Dep. 133-36.) Additionally, the Supervisors maintain adequate staffing to perform all registration-related tasks between the book-closing date and Election Day. (*See, e.g.,* Holland Dep. 91-92; Johnson Dep. 10-12.) Staff are also typically cross-trained so that they may switch between tasks as necessary, in a responsive and fluid manner. (*See, e.g.,* Korman Dep. 55.) Even Supervisor Hollarn does not dispute this. (*See* Hollarn Dep. 59-60, 140-41.) Lastly, there are numerous statutory exceptions to the book-closing deadline.<sup>46</sup> The above-described evidence clearly demonstrates that the concept of a complete "freeze" on registration activity after the book-closing deadline is a fiction.<sup>47</sup>

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<sup>46</sup> *See* Fla. Stat. § 97.053(7) (requiring all voter registration applications be entered into the statewide computerized System within fifteen days); § 97.0555; (certain military personnel allowed to register through Friday before election); Fla. Stat. § 97.055(1) (changes to registered voters' name, address or signature accepted after book-closing deadline); Fla. Stat. § 97.053(6) (verification of voters' drivers license, identification card, or social security number allowable even three days *after* a given election.).

<sup>47</sup> Prohibiting a grace period is also not necessary due to technological limitations. Plaintiffs deposed the vendors responsible for maintaining each of the former defendant Supervisors' computerized voter registration systems (Orange County excepted), who stated that there is no technological obstacle that prevents the implementation of a grace period. (*See e.g.,* Watson Dep. 86.)

**3. Defendant Browning has Offered No Justification for § 97.055's Failure to Include a Grace Period, nor Provided an Explanation as to its Necessity**

Defendant makes even less of a showing as to the necessity of the state's failure to provide a grace period under § 97.055 than was advanced in *Hand, Fulani* and *League of Women Voters*. Again, in his continuing attempt to conflate the issues, Defendant identifies an interest in maintaining the book-closing deadline that is unrelated to the question at hand, i.e. whether there is any legitimate state interest in maintaining a twenty-nine day book-closing period *without grace period*. (Def.'s Mem. 14.) Moreover, the interest asserted is impermissibly tautological, in that maintaining the book-closing deadline cannot be the basis for maintaining the book-closing deadline. Even if Defendant's oblique references to "preservation of the integrity of the electoral process", (*Id.* at 16), could be interpreted as advancing a more legitimate state interest, such "boilerplate" statements, devoid of further support, do not justify the burdening of constitutional rights.<sup>48</sup>

**III. The Balance of Harms Tips Sharply In Plaintiffs' Favor**

In this action, Plaintiffs, their members and the voting public of Florida are threatened with irreparable injury to one of their most fundamental constitutional rights. Defendant has failed to connect maintaining § 97.055 without a grace period with any legitimate governmental interest, much less demonstrate how prohibiting a grace period achieves that interest. For this reason, the balance of harms weighs heavily in Plaintiffs' favor.<sup>49</sup>

**IV. Enjoining § 97.055 Is In The Interest of Florida's Voting Public**

Granting Plaintiff's summary judgment and enjoining § 97.055 in its current form is unquestionably in the public interest. Given that this case is one of equity, this should weigh heavily in the Court's decision. "Public consequences are an integral factor in the equitable exercise of discretion." *Banco Indus. De Venez C.A.*, 99 F.3d, 1045, 1049 (11<sup>th</sup> Cir. 1996). Moreover, the Court clearly has the authority to act in the public interest, as stated in *FTC v. Gem Merch. Corp.*:

[A]ll the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those

<sup>48</sup> *Fulani*, 973 F.2d at 1547 ("We are not persuaded that the unequal availability of the fee-waiver provision is at all necessary to advance the boilerplate interests put forward by the state.").

<sup>49</sup> *See Charles H. Wesley Educ. Found., Inc.*, 408 F.3d at 1355 (Affirming grant of plaintiffs' preliminary injunction, where "[t]he associational and franchise-related rights asserted by the Plaintiffs were threatened with significant, irreparable harm, and the injunction's cautious protection of the Plaintiffs' franchise-related rights is without question in the public interest. In contrast, the harm and costs threatened to the state by these registration forms were minimal, if they existed at all.").

equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.<sup>50</sup>

### Conclusion

For the foregoing reasons, Plaintiffs respectfully request that summary judgment be awarded to the Plaintiffs. In the alternative, Defendant's motion for summary judgment should be denied.

Dated: Miami, Florida  
October 25, 2007

RESPECTFULLY SUBMITTED,

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<sup>50</sup> *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 469 (11th Cir. 1996).

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was sent electronically as an email attachment this 25th day of October, 2007, to counsel for the parties listed in Exhibit A, attached hereto.

Dated: Miami, Florida  
October 25, 2007

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\*\* Pro hac vice motion to be filed.